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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 1006.

DISTRICT OF COLUMBIA, *Petitioner*,

v.

THE QUEEN CITY BREWING COMPANY, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF IN OPPOSITION.

E. BARRETT PRETTYMAN
F. G. AWALT
RAYMOND SPARKS
W. V. T. JUSTIS
822 Connecticut Avenue
Washington, D. C.
Attorneys for Respondent.

HEWES PRETTYMAN AND AWALT
Of Counsel.

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OPINIONS BELOW.

The opinion of the Court of Appeals (R. 75-80) is reported at 134 F. (2) 44. The findings of fact and opinion of the Board of Tax Appeals for the District of Columbia (R. 9-34) are not reported.

JURISDICTION.

The decree of the Court of Appeals (R. 81) was entered on February 8, 1943. The petition for a writ of certiorari was filed in this Court on May 6, 1943. The jurisdiction of this Court rests on Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and on 28 U. S. C. (1940) § 350. See also D. C. Code (1940) § 47-2404(a).

QUESTION PRESENTED.

Whether, as a matter of statutory construction, the Acts of Congress imposing taxes on personal property in the District of Columbia, tax the migratory personal property of a foreign corporation introduced into, and removed from, the District by an independent wholesaler in the course of his business, when the foreign corporation is not doing business in the District.

STATUTES INVOLVED.

The pertinent statutory provisions are set forth in the Appendix (see *infra*, p. 11 *et seq.*).

STATEMENT.

1. ASSESSMENT.—On or about September 20, 1941, the Assessor of the District of Columbia assessed respondent on the value of the average number of its beer containers present in the District during the fiscal years 1938, 1939, 1940, and 1941 (R. 7, 15-16). The Assessor took, as the average number of respondent's containers present in the District during the years in question, the number actually present on the tax days of those years (R. 15). Respondent paid the taxes under protest (R. 8-9) and prosecuted a petition for cancellation and refund to the Board of Tax Appeals for the District of Columbia (R. 2-8).

2. BOARD'S AFFIRMANCE OF ASSESSMENT.—By a decision entered on May 6, 1942, the Board held that respondent's containers had been properly assessed and that respondent was not entitled to a refund (R. 35).

The findings of fact and opinion of the Board (R. 9-34) leading to its decision may be summarized thus:

Facts. Respondent is a Maryland corporation engaged in the manufacture and sale of beer at Cumberland, Maryland (R. 10, 19). During the fiscal years involved, it had no office, plant, warehouse, or other place of business in the

District; nor during that period did it operate vehicles in the District. No officers, directors, or employees of respondent have ever lived in the District, and none of respondent's corporate meetings were held there. Respondent has not paid any person in the District a salary, bonus, or commission. (R. 10.)

During the years in question, respondent sold beer at Cumberland, Maryland, to one Smith, who distributed the beer to retailers and others in the District (R. 10-14, 19). The beer was delivered to the trucks of Smith at Cumberland in three kinds of containers: ½ barrels, ¼ barrels, and wooden cases holding twenty-four bottles (R. 12, 14-15, 19). Upon the delivery of the beer at Cumberland, Smith was required to deposit with respondent $6.00 for each ½ barrel, $4.00 for each ¼ barrel, and 75 cents for each wooden case (R. 14-15). The containers were then brought into the District on Smith's trucks (R. 15), and, after being emptied, were returned on his trucks to respondent's place of business at Cumberland (R. 15, 19-20).[1]

Respondent made returns to the State of Maryland on all of its containers for the years 1938, 1939, 1940, and 1941, and that State assessed respondent on them for the years 1939, 1940, and 1941 (R. 18).

Opinion. The Board held that respondent was not doing business in the District during the years in question and stated that the liability of respondent must "be considered in the light of such holding" (R. 19). It then construed D. C. Code (1940) § 47-501 (see *infra*, p. 12) as imposing a tax on all personal property in the District which could be constitutionally taxed (R. 20-23), and held that the respondent's containers could be thus taxed (R. 23-31). It reasoned that the containers could be taxed because they were habitually employed in the District of Columbia by the respondent in the sense that, though brought into the District

[1] Respondent conceded, and petitioner admitted, that the containers at all times remained the property of respondent (R. 15).

by the wholesaler in the course of his business, they were habitually present in the District in the advancement of respondent's business since, had the respondent not furnished the containers, the moving cause of its sales of beer to the wholesaler at Cumberland, Maryland (i. e., the resale of the beer in the District by the wholesaler), would not have been brought into operation (*idem*).

In reaching its decision that respondent's containers could be validly taxed, the Board relied on the "habitual employment" doctrine stated in *Johnson Oil Refining Company* v. *Oklahoma*, 290 U. S. 158. The Board, however, relied on this case only for the proposition that a taxing authority can constitutionally tax all personal property habitually employed within its borders, and for that proposition alone. It did not interpret that case as holding that a statute which imposes a tax on personal property generally, and which does not use language aptly indicating an intent to tax migratory personal property, should be construed as having an incidence on the latter kind of property (R. 26-30).

3. Reversal of Board by Court of Appeals.—On a petition to review (R. 36-39), the Court of Appeals, by a decree entered on February 8, 1943 (R. 81), reversed the decision of the Board of Tax Appeals. The Court limited its decision to one question: "whether tangible personal property temporarily in the District, belonging to a non-resident not engaged in business in the District, is intended to be and is taxed" under the applicable statutes in force in the District (R. 76). The Court expressly declined to rule on the question whether respondent's containers, under the facts of the case, would be taxable under "appropriate legislation" (R. 80). It concluded that "the statutes [i. e., D. C. Code (1940) §§ 47-1203, 47-1206, 47-1207, 47-501; see *infra*, p. 11, *et seq.*] relied upon [by petitioner] apply only to property that has acquired a fixed definite and permanent taxable situs" in the District (R. 80).

The Court rested its decision principally upon the doctrine of *Marye* v. *B. & O. R. R. Co.*, 127 U. S. 117; i. e., upon the doctrine that a statute imposing a tax on personal property will not be construed as having an incidence on migratory personal property of a foreign owner unless it contains language aptly indicating an intent that such property should be taxed (R. 77-79). In reaching its decision, the Court overruled petitioner's contention that this Court in *Johnson Oil Refining Company* v. *Oklahoma*, *supra*, construed a general tax statute of Oklahoma[1] as imposing a tax on the migratory personal property of a foreign owner (R. 79-80).

ARGUMENT.

1. Petitioner contends (Pet. 7, 8, 10-15) that the Court of Appeals erred in holding that the applicable tax statutes of the District of Columbia (see *infra*, p. 11 *et seq.*) do not assign to respondent's containers a tax situs in the District. Its argument in support of this contention is twofold: *first*, that this Court in the *Johnson Oil Company* case, *supra*, construed a tax statute[1] as having an incidence upon the migratory personal property of a foreign owner even though that statute did not, any more than do the District statutes, contain express provisions for the taxation of such property (Pet. 10); *second*, that this Court in the same case overruled a contention, made under the *Marye* case, *supra*, that such a statute should not be construed as applying to the migratory property of foreign owners (Pet. 11-12). Respondent submits that these arguments are without merit.

First. The only question considered by this Court in its opinion in the *Johnson Oil Company* case was whether, in view of the due process clause of the Fourteenth Amend-

[1] Sec. 9574, C. O. S. 1921, which provided: "All property in this State, whether real or personal, including the property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation."

ment, the State of Oklahoma could tax the entire fleet of 380 cars used by the Company, a foreign corporation, in the course of its interstate shipment of oil from its refinery in Pawnee County, Oklahoma.[1] That question arose on an appeal from a decision of the Supreme Court of Oklahoma holding that the entire fleet had a "taxable situs" in Oklahoma (290 U. S. 159) and therefore were subject to the tax imposed on personal property by Sec. 9574, C. O. S. 1921.[2] *In re Johnson Oil Refining Co.,* 162 Okl. 185, 186. Before considering the question, this Court clearly stated the basis upon which its determination was to be made:

> "As the asserted federal right turns upon the determination of the question of situs, it is our province to analyze the facts in order to apply the law, and thus to ascertain whether the conclusion of the state court has adequate support in the evidence." (290 U. S. 159-160)

The Court then proceeded to summarize the undisputed evidence, which showed that the average number of the Company's cars habitually present in Oklahoma was far less than the number of cars comprising its entire fleet (290 U. S. 160-161). It next stated the law with respect to the power of a state to tax constitutionally the rolling stock of a foreign corporation (290 U. S. 161-162). On that point it concluded that "the basis of jurisdiction is the habitual employment of property within the state" and that "when . . . individual items of rolling stock . . . are constantly changing . . . the state may fix the tax by reference to the average number of cars . . . habitually within its limits" (290 U. S. 162). Applying the law stated to the

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[1] "These cases present the question of the validity of property taxes laid in Pawnee County, Oklahoma, under the state statute, upon the entire fleet of appellant's tank cars. The challenge in each case was under the due process clause of the Fourteenth Amendment of the Federal Constitution upon the ground that the cars did not have their situs within the State and hence that the State had no jurisdiction to tax them." (290 U. S. 159)

[2] See *supra,* p. 5, n. 1.

facts summarized, the Court, reversing the Supreme Court of Oklahoma, held that Oklahoma could not constitutionally tax the entire Company's entire fleet of cars, but stated that it could tax "the number of cars which on the average were found to be physically present within the state" (290 U. S. 163).

It is thus plain that the decision in the *Johnson Oil Company* case did not turn on a construction of the Oklahoma statute under which the Company had been taxed. This Court accepted the fact that the Company's entire fleet had been taxed under a "state statute" and then immediately proceeded to determine, and to determine only, the question whether Oklahoma could, in view of the facts in the case, constitutionally tax the entire fleet. Never once did it refer to the terms of the Oklahoma statute or in any way suggest that its determination was dependent upon the terms of that statute. The Court's statement that Oklahoma could validly tax "the number of cars which on the average were found to be physically present in" Oklahoma was a statement that a certain portion of the Company's fleet could, under the facts of the case, be properly taxed. It was not a construction of the incidence of the Oklahoma statute. Nor could it have been; for the Supreme Court of Oklahoma had, in that very case, construed the statute in question as not "authorizing a tax based upon an 'average number' of cars present on a given day at any one taxable point,"[1] and that construction was binding on this Court. *Minnesota* v. *Probate Court,* 309 U. S. 270, 273.

Second. There are several considerations which may be relied upon to demonstrate that this Court in the *Johnson Oil Company* case did not overrule a contention that a tax statute should not, under the *Marye* case, be construed as having application to the migratory property of a foreign owner unless it contains provisions showing that such property was intended to be taxed.

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[1] *In re Johnson Oil Refining Company, supra,* 186.

In the first place, as shown above, the decision in the *Johnson Oil Company* case did not turn on a question of statutory construction but on the sole question whether, when the facts of record were considered in the light of the applicable principles of constitutional law, the State of Oklahoma had the power to tax the Company's entire fleet of cars. In the second place, this Court in the *Johnson Oil Company* case relied (290 U. S. 161, 162) on the first holding of the *Marye* case, i. e., that a state can constitutionally tax a foreign owner's migratory property habitually employed within its borders (127 U. S. 123-124), but failed to refer to the second holding of that case, i. e., the holding on the question of statutory construction (127 U. S. 124-125). It is beyond belief that this Court in the *Johnson Oil Company* case relied on the first holding of the *Marye* case in reaching its determination of the one question which it considered and then, *sub silentio*, overruled the second holding of the *Marye* case even though that holding was not germane to the question determined in the *Johnson Oil Company* case. Finally, the rule of construction stated by this Court in the *Marye* case, which arose on an appeal from a judgment entered by a lower federal court in a diversity of citizenship suit, was not predicated on a federal right and, therefore, could not properly have been raised before, or considered by this Court in the *Johnson Oil Company* case since that case arose on an appeal from a judgment of a state court.

2. Petitioner states (Pet. 2-3) that this Court should allow a writ in this case because the Court of Appeals "has decided a question of general importance which has not, but should be, settled by this Court." This statement is susceptible of two interpretations and two answers.

First. Petitioner's statement may mean that the Court of Appeals in deciding to construe the District statutes consonantly with the rule of construction used by this Court in the *Marye* case has decided a legal question of large

importance with respect to the proper construction of tax statutes. If this is the meaning, the statement carries its own answer. The Court of Appeals followed a decision of this Court that was directly in point, and, therefore, it can hardly be said that the question raised is one which has not been determined by this Court. Another answer to the statement, as thus interpreted, is that the question whether the rule of the *Marye* case should be used in the construction of tax statutes is not one of general importance; for it is neither a question which can be raised in federal courts under state statutes, except in diversity of citizenship cases (and then only in the unlikely event that there is not an outstanding construction by a state court), nor a question which is likely to arise under federal statutes other than those applicable to the District of Columbia.

Second. Petitioner's statement may be taken to mean that the decision of the Court of Appeals is of general importance because it put beyond petitioner's reach a source of tax revenue to which it asserted a right. We submit, however, that viewed in this light the question decided by the Court of Appeals is one of local or municipal importance and not one of the general or federal importance necessary to call into operation the discretionary power of supervision which this Court exercises over the decisions of the Court of Appeals. In this connection, it would seem to respondent that, decision having been rendered by the Court of Appeals (the court of last resort in the District) in a manner not raising any matter of importance, the question should no longer be whether the statutes of the District of Columbia do tax a foreign owner's migratory property brought into the District by another in the course of his business, but whether such property, as a matter of fiscal policy, should be taxed. And respondent thinks that this question is an appropriate one for the Congress to determine.

CONCLUSION.

This case presents a question of local importance only. The Court of Appeals decided that question in conformance with the applicable decision of this Court. Respondent respectfully submits, therefore, that the petition for a writ of certiorari should be denied.

Respectfully submitted,

E. Barrett Prettyman
F. G. Awalt
Raymond Sparks
W. V. T. Justis
822 Connecticut Avenue
Washington, D. C.
Attorneys for Respondent.

Hewes Prettyman and Awalt
Of Counsel.

